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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Robert Dean Carter, Jr.,) No. CV 08-1651-PHX-DGC (MEA)
Plaintiff,)
vs.) **ORDER**
Joseph Arpaio,)
Defendant.)

In this civil rights action brought by a former county jail inmate, Defendant moved to dismiss on statute of limitations grounds and for lack of exhaustion (Doc. # 11). Plaintiff did not file a response, and the Court granted Defendant's motion and entered judgment on April 14, 2009 (Doc. ## 14-15). Plaintiff then moved to reopen, contending that he attempted to mail his response to Defendant's Motion to Dismiss, but that prison officials never sent it (Doc. # 16). The Court granted Plaintiff's motion and reopened this case (Doc. # 18). The Court further directed Plaintiff to file his response to Defendant's Motion to Dismiss. Plaintiff has filed his response (Doc. # 20) and Defendant has replied in support of his motion (Doc. # 24). The Court will grant the Motion to Dismiss and terminate this action.

I. Background

In his Complaint, Plaintiff alleged that in November 2005 he was denied medical care for injuries sustained in a fall from his bunk (Doc. # 1). Plaintiff also claimed that the denial of such care and his subsequent placement in solitary confinement posed serious threats to

1 his safety and constituted retaliation for seeking medical care. Plaintiff specifically alleged
2 that Defendant Arpaio implemented and promoted policies that resulted in the violations
3 alleged (*id.* at 2, 4-6). While Plaintiff acknowledged that a grievance procedure existed at
4 the jail, he claimed that he had been placed in solitary confinement, denied a pencil and
5 grievance forms, and was seriously ill (*id.*). The Court required Defendant Arpaio to answer
6 Counts I through III (Doc. # 6).¹

7 Defendant Arpaio moves to dismiss on statute of limitations grounds and for lack of
8 exhaustion. Specifically, Defendant Arpaio argues that because Plaintiff's claims accrued
9 in November 2005 and he did not file his Complaint until September 2008, his claims are
10 barred by the two year statute of limitations. Alternatively, Defendant Arpaio contends that
11 Plaintiff failed to file a single grievance as to the claims in his Complaint (Doc. # 8 at 6).

12 Plaintiff was issued an Order containing the customary warnings regarding his
13 obligation to respond and the potential consequences for failing to do so (Doc. # 12).² In his
14 response, Plaintiff first contends that he is seriously mentally ill and has received disability
15 benefits since 2001 (Doc. # 20 at 2). Consequently, Plaintiff argues that because his
16 disability continues to this day, the statute of limitations has never begun to run and his
17 claims are not untimely. Plaintiff also contends that he had no available administrative
18 remedies because he did not know the extent of his injury until he was released from custody
19 and taken to surgery (*id.* at 3).³

20 In reply, Defendant Arpaio argues that Plaintiff has not presented any evidence to
21 support his claim that his disability rendered him unable to pursue his claims, thereby tolling
22 the statute of limitations (Doc. # 24 at 2). Further, Defendant Arpaio maintains that Plaintiff
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24 ¹ Plaintiff's allegations of negligence were dismissed (Doc. # 6 at 4).

25 ² Notice required under Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003).

26 ³ The Court also notes that Plaintiff submitted a First Amended Complaint with his
27 response (Doc. # 21). This amended pleading presents identical claims to the original
28 Complaint and therefore it is unnecessary to direct Defendant Arpaio to respond to the
amended pleading.

1 has presented inconsistent explanations for why he failed to exhaust his administrative
2 remedies. Defendant Arpaio argues that Plaintiff knew in November 2005 that he fell from
3 his bunk, did not receive the medical care he needed, and was placed in solitary confinement
4 in retaliation for seeking medical care (*id.* at 3). Plaintiff did not, however, obtain a
5 grievance form and exhaust his available administrative remedies.

6 **II. Legal Standard**

7 **A. Statute of Limitations**

8 In § 1983 actions, the applicable statute of limitations is the forum state's statute of
9 limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266, 274-76 (1985);
10 Vaughan v. Grijalva, 927 F.2d 476, 478 (9th Cir. 1991). The Arizona statute of limitations
11 for personal injury actions is two years. See A.R.S. § 12-542(1); Madden-Tyler v. Maricopa
12 County, 943 P.2d 822, 824 (Ariz. Ct. App. 1997); Vaughan, 927 F.2d at 478.

13 The Court must also apply any state rule for tolling to actions brought under § 1983.
14 Hardin v. Straub, 490 U.S. 536, 544 (1989); Johnson v. State of California, 207 F.3d 650,
15 653 (9th Cir. 2000); TwoRivers v. Lewis, 174 F.3d 987, 992 (9th Cir. 1999). Under Arizona
16 law, the limitation period is tolled during mandatory exhaustion of administrative remedies.
17 See Arizona Dep't of Revenue v. Dougherty, 29 P.3d 862 (Ariz. 2001); Third & Catalina
18 Assoc. v. City of Phoenix, 895 P.2d 115, 119 (Ariz. Ct. App. 1994); see also A.R.S. § 12-
19 821.01(c) (cause of action required by law or contract to be submitted to administrative
20 review process does not accrue until process exhausted). Arizona otherwise provides for
21 tolling of the statute of limitation after a cause of action accrues for the period during which
22 a plaintiff was less than 18 years old or of unsound mind. A.R.S. § 12-502.

23 **B. Exhaustion**

24 The PLRA provides that a prisoner may not bring a lawsuit with respect to prison
25 conditions under § 1983 unless all available administrative remedies have been exhausted.
26 See 42 U.S.C. § 1997e(a); Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006);
27 Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). He must complete the administrative
28 review process in accordance with the applicable rules. See Woodford v. Ngo, 548 U.S. 81,

1 92 (2006). Exhaustion is required for all suits about prison life, Porter v. Nussle, 534 U.S.
2 516, 523 (2002), regardless of the type of relief offered through the administrative process,
3 Booth v. Churner, 532 U.S. 731, 741 (2001).

4 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 216 (2007).
5 Defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315
6 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule 12(b)
7 motion, a court may look beyond the pleadings to decide disputed issues of fact. Id. at 1119-
8 20. Further, a court has broad discretion as to the method to be used in resolving the factual
9 dispute. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th
10 Cir. 1988) (quotation omitted).

11 **III. Analysis**

12 **A. Statute of Limitations**

13 Defendant Arpaio argues that Plaintiff's claims are barred by the statute of limitations.
14 Plaintiff
15 contends that because he has been determined to be seriously mentally ill and has received
16 disability benefits since 2001, the statute of limitations has been tolled and his claims are not
17 untimely.

18 The Court cannot find that Plaintiff is entitled to tolling based on his allegation that
19 he is seriously mentally ill.⁴ Not only has Plaintiff failed to describe his illness with any
20 specificity, but he fails to provide even a scintilla of evidence to support his contention.
21 Moreover, the "focus of the unsound mind inquiry is on a plaintiff's ability to manage his or
22 her ordinary daily affairs." Florez v. Sargeant, 917 P.2d 250, 255 (Ariz. 1996). Plaintiff's
23 claim that he is seriously mentally ill does not automatically mean that he has been unable
24 to manage his daily affairs. As in Florez, Plaintiff fails to provide a declaration or any other
25 evidence regarding the nature of his illness and how it prevented him from pursuing his claim
26 within the statute of limitations. Florez, 917 P.2d at 255. Plaintiff's conclusory allegation

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28 ⁴Because Plaintiff acknowledges that he did not utilize the grievance procedure (Doc.
20 at 2), there is no time to toll during exhaustion.

1 that he is seriously mentally is insufficient to toll the statute of limitations. Plaintiff's
2 claims, therefore, are untimely. See Doe v. Roe, 955 F.2d 951, 964 (Ariz. 1998) (citing
3 Florez, 917 P.2d at 255) ("The policy of protecting defendants against stale and fraudulent
4 claims cannot be overcome by conclusory averments such as assertions that one was unable
5 to manage daily affairs or understand legal rights and liabilities.").

6 **B. Exhaustion**

7 In support of his argument that Plaintiff also failed to exhaust his administrative
8 remedies, Defendant Arpaio submitted the affidavit of Sergeant Susan Fisher (Fisher Aff.,
9 Ex. 1, Doc. # 11). Fisher attested that inmates are notified of the grievance procedure when
10 they receive the Maricopa County Sheriff's Office Rules and Regulations for Inmates and
11 that grievance forms explain the sequential steps in the grievance procedure (*id.* at ¶¶ 4-5).
12 She further attested that she reviewed Plaintiff's grievance records and determined that
13 Plaintiff filed one grievance on October 14, 2005 related to psychiatric medication, but did
14 not file any grievances related to the claims presented in his Complaint (*id.* at ¶ 7).

15 In response, Plaintiff acknowledged that he did not file any grievances while in
16 Maricopa County custody (Doc. # 20 at 2-3). Rather, Plaintiff claimed that he did not
17 become aware of his claims until his release and, therefore, had no remedy available to him
18 (*id.*). In his Complaint, Plaintiff alleged that in November 2005 he fell from his bunk and
19 injured himself because there was no ladder on the bed. Plaintiff further claimed that his
20 resulting chest pain was so severe that he could not eat. Plaintiff alleged that in retaliation
21 for seeking medical treatment, he was placed in solitary confinement for several weeks
22 (Doc. # 1 at 4-6). Plaintiff was aware of all of these alleged facts at the time they occurred
23 in November 2005. Plaintiff's contention that he did not know of his claims until he was
24 released from custody is unavailing.

25 Moreover, Plaintiff presented a completely different explanation for his failure to
26 exhaust in his Complaint—that he was prevented from using the grievance system. But
27 Plaintiff has not specifically named any individual who refused his request for grievance
28 forms, nor has he described with any degree of specificity (dates, times, or other identifying

circumstances) what transpired to prevent him from filing grievances. Plaintiff has not presented any evidence to support his contentions. The Court finds that Defendant Arpaio has also met his burden to establish nonexhaustion.

4 || IV. Conclusion

5 Plaintiff's claims are barred by the statute of limitations and are subject to dismissal
6 for failure to exhaust. Defendant Arpaio's Motion to Dismiss will be granted and this action
7 will be dismissed.

8 || IT IS ORDERED:

- 9 (1) The reference is withdrawn from the Magistrate Judge as to Defendant's
10 Motion to Dismiss (Doc. # 11).
11 (2) Defendant's Motion to Dismiss (Doc. # 11) is **granted**.
12 (3) This action is dismissed without prejudice for failure to exhaust. The Clerk of
13 Court is directed to enter judgment accordingly.

14 DATED this 13th day of August, 2009.

Daniel G. Campbell

**David G. Campbell
United States District Judge**